80-1556

Office-Supreme Court, U.S.
FILED
MAR 12 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROLLER OF THE STATE OF CALIFORNIA AND
COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

VS.

ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax
Attorney
Division of Inheritance
& Gift Tax
107 South Broadway
Los Angeles, CA 90012

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE,
NEMEROVSKI, CANADY &
POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, California 94108
(415) 434-1600

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK THOMAS,
WINTERS & SHAPIRO
Capital National Bank Building
Post Office Box 1148; 12th Floor
Austin, Texas 78767
(512) 472-8442
Attorneys for Petitioners

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether a dispute between states as to which state was the domicile of a decedent for death tax purposes is a "controvers[y] between two . . . States" within the Court's original and exclusive jurisdiction under 28 U.S.C. § 1251(a), so as to preclude such a dispute from being entertained by a federal district court pursuant to the Federal Interpleader Act.

2. Whether the Federal Interpleader Act grants district courts jurisdiction to resolve controversies between two states concerning their conflicting domicile-based inheritance tax claims, notwithstanding the fact that neither states nor their taxing officials are "citizens of a state" for purposes of diversity and interpleader jurisdiction.

3. Whether an interpleader claimant with an interest in the fund at issue is a "claimant" within the meaning of the Federal Interpleader Act, so as to establish federal jurisdiction with a $500 jurisdictional minimum (and nationwide service of process) in cases where the only parties to the action are the stakeholder plaintiff and one claimant defendant who is a citizen of a diverse state.

4. Whether the Court of Appeals erred in summarily refusing to consider the effect of a change in state law rendered after its decision which deprived the federal courts of jurisdiction over this action, in violation of the rule enunciated in *Huddleston v. Dwyer,* 322 U.S. 232 (1944).

5. Whether, in a controversy between two states over their conflicting domicile-based inheritance tax claims, venue should be transferred so that the action may be heard in a forum whose residents have no personal interest in the cause of one of the claimant states.

PARTIES

There are two petitioners, each appearing in his official capacity: Kenneth Cory, the Controller of the State of California, and H. B. Alvord, the County Treasurer of the County of Los Angeles. Respondents include Mark White, the Attorney General of the State of Texas; Bob Bullock, the Comptroller of the State of Texas; William Rice Lummis, as Texas Administrator of the Estate of Howard R. Hughes, Jr. (the Estate), as Nevada Co-Special Administrator of the Estate, as Louisiana Provisional Administrator of the Estate, and as Delaware Ancillary Administrator of the Estate; Richard Gano, the California General Administrator of the Estate; the First National Bank of Nevada, the Nevada Co-Special Administrator of the Estate; and the United States of America.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THE WRIT SHOULD BE GRANTED SO THAT THE COURT CAN DETERMINE THE APPROPRIATE FORUM TO RESOLVE INTERSTATE DEATH TAX CONTROVERSIES	6
A. The Federal Interpleader Act Cannot Give a District Court Jurisdiction to Consider Death Tax Domicile Controversies Between States Because Such Cases Are Within This Court's Original Jurisdiction	7
B. Jurisdiction Cannot Be Invoked Under the Federal Interpleader Act to Resolve Death Tax Domicile Controversies Between States Because States Are Not "Citizens of a State" for Purposes of Diversity and Interpleader Jurisdiction	9
C. Interpleader Should Not Be Used to Resolve Death Tax Domicile Controversies Between States Because It Requires States to Submit Their Tax Claims to Jurors Who Will Be Citizens of a Rival Claimant State	12
II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' HOLDING THAT THE CITIZENSHIP OF A STAKEHOLDER SHOULD BE CONSIDERED IN DETERMINING WHETHER INTERPLEADER JURISDICTION EXISTS, A RULING WHICH RADICALLY EXPANDS FEDERAL JURISDICTION	15

PAGE

III. THE WRIT SHOULD ISSUE BECAUSE THE COURT OF APPEALS' FINDING OF JURISDICTION HAS BEEN SUPERSEDED BY CHANGES IN CALIFORNIA LAW 18

IV. THE WRIT SHOULD ISSUE TO REVIEW THE COURT OF APPEALS' DECISION REQUIRING CALIFORNIA, A SOVEREIGN STATE, TO SUBMIT ITS TAX CLAIM TO A JURY COMPOSED OF CITIZENS OF TEXAS, A RIVAL STATE 23

CONCLUSION 30

TABLE OF AUTHORITIES

CASES	PAGES
Adams Express Co. v. Denver & Rio Grande Railway, 16 F. 712 (C.C.D. Colo. 1883)	20
Alderman v. Elgin, J. & E. Ry. Co., 125 F.2d 971 (7th Cir. 1942)	20
Allen v. Flournoy, 26 Cal. App. 3d 774, 103 Cal. Rptr. 275 (1972)	23
Allstate Insurance Co. v. Lumbermen's Mutual Casualty Co., 204 F. Supp. 83 (D. Conn. 1962)	20
Arizona v. New Mexico, 425 U.S. 794 (1976)	8
Bry-Man's, Inc. v. Stute, 312 F.2d 585 (5th Cir. 1963)	24
Builders & Developers Corp. v. Manassas Iron & Steel Co., 208 F. Supp. 485 (D. Md. 1962)	17
California v. Texas, 437 U.S. 601 (1978)	3, 4, 6, 7, 9
Chance v. County Board of School Trustees, 332 F.2d 971 (7th Cir. 1964)	20
Chisholm v. Georgia, 2 Dall. (2 U.S.) 419 (1793)	13
Clarkson Co., Ltd. v. Shaheen, 544 F.2d 624 (2d Cir. 1976)	20
Connally v. Georgia, 429 U.S. 245 (1977)	26
Craig v. Southern Natural Gas Co., 125 F.2d 66 (5th Cir. 1942)	10
Dakota Livestock v. Keim, 552 F.2d 1302 (8th Cir. 1977)	19
DeMiglio v. Paez, 189 N.Y.S. 2d 593, 18 Misc. 2d 914 (1959)	8
Drumright v. Texas Sugarland Co., 16 F.2d 657 (5th Cir.), *cert. denied*, 274 U.S. 749 (1927)	20
Edelman v. Jordan, 415 U.S. 651 (1974)	4, 6
Epperson v. United States, 490 F.2d 98 (7th Cir. 1973)	25
Fetzer v. Cities Service Oil Co., 572 F.2d 1250 (8th Cir. 1978)	20
Finn v. American Fire & Casualty Co., 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954)	20
Forest Oil Co. v. Crawford, 101 F. 849 (3d Cir. 1900)	20, 21
Friedberg v. Santa Cruz, 86 N.Y.S. 2d 369, 274 App. Div. 1072 (1949)	8
Fryer v. Weakley, 261 F. 509 (8th Cir. 1919)	20
Gaddis v. Junker, 27 F.2d 156 (E.D. Tex. 1928)	20
Grady v. Irvine, 254 F.2d 224 (4th Cir. 1958), *cert. denied*, 358 U.S. 819 (1958)	21
Haas v. Jefferson National Bank, 442 F.2d 394 (5th Cir. 1971)	20
Hoffman v. Blaski, 363 U.S. 335 (1960)	13, 14
Huddleston v. Dwyer, 322 U.S. 232 (1944)	22
Humble Oil & Refining Co. v. Sun Oil Co., 190 F.2d 191 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952)	21

CASES	PAGES
Hunt Tool Co. v. Moore, Inc., 212 F.2d 685 (5th Cir. 1954)	21
Johnson v. Riverland Levee District, 117 F.2d 711 (8th Cir. 1941)	21
Kansas City Southern R.R. Co. v. Morley, 88 F. Supp. 300 (W.D. Ark. 1950)	10
Kendrick v. Kendrick, 16 F.2d 744 (5th Cir. 1926), *cert. denied*, 273 U.S. 758 (1927)	20
Kennametal, Inc. v. International Union, 161 F. Supp. 362 (W.D. Pa. 1958)	19
Kentucky Natural Gas Corp. v. Duggins, 165 F.2d 1011 (6th Cir. 1948)	20
Lipscomb v. Lipscomb, 265 F.2d 822 (D.C. Cir. 1959)	13
Marshall v. Jerrico, Inc., —U.S.—, 48 U.S.L.W. 4485 (April 28, 1980)	26
In re Murchison, 349 U.S. 133 (1955)	29
Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971)	13
Pan American Fire & Casualty Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960)	17
Pennsylvania v. New York, 407 U.S. 206 (1972)	9
People ex rel McColgan v. Bruce, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942)	10
Postal Telegraph Cable Co. v. Alabama, 155 U.S. 483 (1894)	10
Preiser v. Rodriguez, 411 U.S. 475 (1973)	8
Publicker Industries, Inc. v. Roman Ceramics Corp., 603 F.2d 1065 (3d Cir. 1979)	20
Query v. 206 Cases of Assorted Liquor, 49 F. Supp. 693 (W.D.S.C. 1943)	10
Ralli-Coney, Inc. v. Gates, 528 F.2d 572 (5th Cir. 1976)	20
Reynolds v. Wabash R.R. Co., 236 F.2d 387 (8th Cir. 1956)	20
Riley v. Worcester County Trust Co., 89 F.2d 59 (1st Cir. 1936), *aff'd on other grounds*, 302 U.S. 292 (1937)	10
Rippey v. Denver United States National Bank, 42 F.R.D. 316 (D. Colo. 1967)	21
Robertson v. Ingram-Day Lumber Co., 271 F. 1023 (5th Cir. 1921)	10
Robertson v. Jordan River Lumber Co., 269 F. 606 (5th Cir. 1921)	10
Ross v. Bernhard, 396 U.S. 531 (1970)	13
Shafer v. Children's Hospital Society, 265 F.2d 107 (D.C. Cir. 1959)	13
Smith v. Allwright, 321 U.S. 649 (1944)	15
Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951)	8

CASES — PAGES

State Highway Commission v. Utah Construction Co., 278 U.S. 194 (1929) 10
State Water Control Board v. Washington Suburban Sanitary Commission, 61 F.R.D. 588 (D.D.C. 1974) 8, 9
Texas v. Florida, 306 U.S. 398 (1939) 3
Texas v. New Jersey, 379 U.S. 674 (1965) 9
Treines v. Sunshine Mining Co., 308 U.S. 66 (1939) 11
Tumey v. Ohio, 273 U.S. 510 (1927) 26
United States v. Will, — U.S. —, 49 U.S.L.W. 4045 (December 15, 1980) 26
Wallace v. Knapp-Monarch Co., 234 F.2d 853 (8th Cir. 1956) 20
Ward v. Village of Monroeville, 409 U.S. 57 (1972) 26
Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961) 8
Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1888) 13
Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937) 4, 6
Wormley v. Wormley, 8 Wheat. (21 U.S.) 421 (1823) 10

STATUTES

A.B. 2092, CH. 634, CAL. STATS. 1980 ..... 3, 6, 18
CAL. REV. & TAX. CODE § 14104 ..... 3, 6, 19
CAL. REV. & TAX. CODE § 14791 ..... 3, 6, 18
CAL. REV. & TAX. CODE § 14793-95 ..... 3, 6, 18
28 U.S.C. 1251(a) 2, 7, 8
28 U.S.C. 1292(b) 4
28 U.S.C. § 1332(a) 16
28 U.S.C. 1335 ..... 3, 6
28 U.S.C. § 1335(a) 2, 15
28 U.S.C. § 1346(a)(1) 13
28 U.S.C. § 1397 ..... 12, 13, 16, 24
28 U.S.C. § 1401(a) 13, 23, 24
28 U.S.C. § 2361 16
28 U.S.C. § 2402 13

OTHER AUTHORITIES

2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1681 (4th ed. 1873) 13
6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE CIVIL § 1556 (1971) 9, 10
3A MOORE'S FEDERAL PRACTICE ¶ 1704 (1979) 10
STATE OF TEXAS 1977 ANNUAL FINANCIAL REPORT 18-19 25

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROLLER OF THE STATE OF CALIFORNIA AND
COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

VS.

ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, the Controller of the State of California (Kenneth Cory) and the County Treasurer of the County of Los Angeles (H. B. Alvord), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on October 27, 1980.[1]

[1] This Petition is intended to be considered together with the Motion for Leave to File Complaint in *California v. Texas*, No. ____, Original, filed concurrently with this Petition.

OPINIONS BELOW

The Court of Appeals opinion is reported at 629 F.2d 397 (5th Cir. 1980) and is reprinted as Appendix "A" in the separately bound volume of appendices filed herewith (hereafter cited as "App."). The order denying a petition for rehearing is noted at 634 F.2d 630 (5th Cir. 1980), and is reprinted as Appendix "B". The order denying Petitioners' Motion for Leave to File Petition for Rehearing Out of Time is unreported and appears as Appendix "C".

The opinion of the District Court is reported at 491 F. Supp. 5 (W.D. Tex. 1979) and appears as Appendix "D". The District Court's prior orders denying Petitioners' Motion to Add Defendants and their Motion to Change Venue are unreported and are reprinted as Appendices "E" and "F", respectively. The District Court's order and judgment dismissing the action are reprinted as Appendices "G" and "H".

JURISDICTION

The Court of Appeals rendered its decision in this case on October 27, 1980. A timely petition for rehearing was denied on December 12, 1980, and this Petition has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The principal statutes involved in this case are 28 U.S.C. § 1251(a) and 28 U.S.C. § 1335(a). 28 U.S.C. § 1251(a) provides:

> "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."

28 U.S.C. § 1335(a) provides in relevant part:

> "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person . . . having in his . . . custody or possession money or property of the value of $500 or more, . . . if . . . [t]wo or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property . . . ."

This case also involves Sections 14104, 14791, and 14793-95 of the California Revenue and Taxation Code as well as Chapter 634 of the 1980 California Statutes, which made certain changes in these statutes. The relevant provisions of the California Revenue and Taxation Code and of Cal. Stats. 1980, Chap. 634 are set out in Appendix I.

STATEMENT OF THE CASE

This action was brought under the Federal Interpleader Act (28 U.S.C. § 1335) by Respondent William Rice Lummis, the Texas Administrator of the Estate of Howard R. Hughes, Jr. ("the Estate").[2] The principal Defendants named in the Complaint are the inheritance tax officials of California and Texas.[3] The First Amended Complaint asserts that these officials are seeking to tax the Estate on the basis of inconsistent claims that each of their respective states was Howard Hughes' domicile at death and requests the District Court to adjudicate the issue of domicile.

Before the present action was brought, California sued Texas in this Court, invoking the Court's original jurisdiction in reliance upon *Texas v. Florida*, 306 U.S. 398 (1939). In June, 1978, California's Motion for Leave To File Complaint was denied. *California v. Texas*, 437 U.S. 601 (1978). The Court gave no reason for denying the motion, but four Justices

---

[2] At the time the Complaint was filed, there were two Administrators of the Estate in Texas and both were named as Plaintiffs. Since that date, however, one of the two Texas Administrators has died. The remaining Administrator, Respondent William Rice Lummis, continues to serve as the sole Texas Administrator of the Estate and the sole Plaintiff.

[3] Also named as Defendants are the United States, the County Treasurer of the County of Los Angeles, and the Administrators of the Estate in Nevada, California, Louisiana, and Delaware. Because it found that all the Administrators had identical interests, the District Court realigned all the Administrators as Plaintiffs. App. 3d. Plaintiff did not appeal from this determination nor did the Court of Appeals question this aspect of the District Court's decision.

The County Treasurer of Los Angeles was named as a Defendant because, at the time the complaint was filed, California law provided that he would receive a tiny percentage of the Estate if Hughes were determined to have been a California domiciliary. CAL. REV. & TAX. CODE §§ 14104,14795. These statutes were later amended to remove the County Treasurer from California's inheritance tax procedure. CAL. STATS. 1980, CHAP. 634, § 15.2, 28-32; *see* App. 19i, 36i. Because of this revision, the County Treasurer will no longer receive any funds from the Estate, even if Hughes is adjudged to have been a California domiciliary.

suggested in concurring opinions that resort to the original jurisdiction was unnecessary inasmuch as a determination of Hughes' domicile might be obtained in a federal district court pursuant to the Federal Interpleader Act.[4]

Three weeks after the decision in *California v. Texas*, the Estate filed the present action in the United States District Court for the Western District of Texas. Soon after the complaint was filed, the District Court entered a temporary restraining order prohibiting California and Texas from pursuing domicile-based inheritance tax claims in the courts of their own states or in any other forum. This injunction was later continued by the Fifth Circuit.

Petitioners made two related motions in the fall of 1978. First, they asked the District Court to enter an order adding as defendants some twenty-two persons whom Respondent Lummis himself had recognized as the heirs of Howard Hughes. Second, they moved for an order transferring the action to a neutral forum—the District of Colorado—which all parties concede was not the domicile of Hughes. Petitioners urged this case should not be heard in a forum whose jurors would have—through their residency and their interest in the treasury of their state's government—a personal interest in the outcome. Both of these motions were denied by the District Court in November, 1978.[5]

Following these decisions, Petitioners filed a Motion to Dismiss, which was heard in tandem with a motion to dismiss previously filed by the Texas taxing officials. In July, 1979, the District Court issued an order granting the motions, finding that subject-matter jurisdiction under the Federal Interpleader Act had not been established. App. "D". The court concluded that

---

[4] Although the Court had previously ruled in *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937) that such an action was barred by the Eleventh Amendment, the concurring Justices in *California v. Texas* suggested that this holding had been undercut by *Edelman v. Jordan*, 415 U.S. 651 (1974). *See California v. Texas*, 437 U.S. at 601 (Brennan, J., concurring), at 608 n. 10 (Stewart, J., concurring), and at 615 (Powell, J., concurring).

[5] These orders were later withdrawn and reissued by the District Court, with the revised orders adding a certification under 28 U.S.C. § 1292(b). The Court of Appeals later held that this certification was unnecessary since these orders were merged into the District Court's final order of dismissal; as a result, the appellate court eventually reviewed the merits of these rulings. The orders reprinted in Appendices F and G are the revised orders.

although the First Amended Complaint named some ten defendants, there was only one defendant—the County Treasurer of Los Angeles—who was both a "claimant" to property in Plaintiff's custody or possession and a "citizen of a state" for diversity purposes.[6] *Id.* 3d-5d. The court thus held that the jurisdictional prerequisites established by Section 1335 had not been met. Respondent Lummis appealed from this order and Petitioners cross-appealed, contending that the District Court's denial of their motions to add parties and change venue was erroneous.

On appeal, the Fifth Circuit reversed the District Court's finding of lack of interpleader jurisdiction, but affirmed its orders denying Petitioners' motions. App. "A". The court held that Respondent Lummis, as Texas Administrator of the Estate, is a "claimant" under the interpleader statute, and that "the citizenship of an interested stakeholder [*i.e.* Lummis] may be considered for purposes of establishing diversity under section 1335." *Id.* 11a. Since Respondent Lummis' citizenship was diverse to that of the County Treasurer of Los Angeles, the court held that interpleader jurisdiction was established. *Id.* 11a-12a. On the issues presented by California's cross-appeal, the court held that joinder of the prospective heirs was unnecessary (*id.* 12a) and that the District Court did not "abuse its discretion in denying the transfer of venue motion." *Id.* 4a n.5. A timely Petition for Rehearing was denied on December 12, 1980. App. "B".

On January 16, 1981, Petitioners filed a second Petition for Rehearing, together with a motion for leave to file that petition out of time. This petition was based on a recently enacted California statute which, as part of a general overhaul of the state's inheritance tax law, eliminated the interest of the County

---

[6] Although the Texas taxing officials are also interpleader "claimants", the District Court held that they were not "citizens of a state" for purposes of diversity jurisdiction. App. 4d; *see* pp. 9-10, *infra*. As to the remaining defendants (*see* note 3, *supra*), the court found that the United States was similarly not a "citizen of a state" for diversity purposes and held that the Defendant Administrators were not "claimants" to money or property of the Estate. App. 2d-3d.

Treasurer of Los Angeles in the Hughes estate.[7] Petitioners urged that this change in California law warranted dismissal of the action. Since the Court of Appeals had determined that the County Treasurer was one of the two adverse and diverse claimants required for interpleader jurisdiction, Petitioners contended that the court's jurisdiction had been dissipated because the County Treasurer was no longer an interpleader "claimant," leaving only one such claimant who was also a citizen of a state (Respondent Lummis). Petitioners' motion for leave to file the out of time petition for rehearing was summarily denied on January 23, 1981. App. "C".

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED SO THAT THE COURT CAN DETERMINE THE APPROPRIATE FORUM TO RESOLVE INTERSTATE DEATH TAX CONTROVERSIES.

The ultimate issue presented by this Petition is how interstate controversies regarding multiple domicile-based death tax claims shall be resolved. In *California v. Texas*, 437 U.S. 601 (1978), four Justices suggested that the Federal Interpleader Act (28 U.S.C. § 1335) might provide a jurisdictional basis for federal adjudication of such disputes since the Eleventh Amendment bar to such actions created by *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937), had been removed by *Edelman v. Jordan*, 415 U.S. 651 (1974). *California v. Texas*, 437 U.S. at 601 (Brennan, J., concurring), at 608 n. 10 (Stewart, J., concurring), and at 615 (Powell, J., concurring).

Because the concurring opinions in *California v. Texas* focused solely on whether interpleader jurisdiction was consistent with the Eleventh Amendment, they did not consider whether other jurisdictional problems would prevent federal

[7] The statute (AB 2092) repealed Sections 14791-95 of the California Revenue and Taxation Code (which previously had provided for payment of inheritance taxes in the first instance to the County Treasurer and retention by him of a "commission" to cover expenses of collection) and amended Section 14104 of the California Revenue and Taxation Code to require payment of the tax to the State controller. AB 2092, §§ 15.2, 28-32; *see* App. 19i, 36i. These provisions "apply to all estates, effective January 1, 1981." *Id.* § 46; *see* App. 38i.

statutory interpleader from being used to resolve interstate death tax controversies. Nor did they discuss the practical problems which such an invocation of federal interpleader jurisdiction would cause. This is hardly surprising, since both parties to *California v. Texas* assumed the continuing validity of *Worcester County*, and the problems which might be created by using federal interpleader to resolve interstate death tax controversies were neither briefed nor discussed at oral argument in that case.

The subsequent course of the Hughes estate litigation since *California v. Texas* has made clear, however, that wholly apart from the Eleventh Amendment, federal interpleader is neither an available nor a suitable means of resolving such controversies. It is not *available* (a) because such cases are interstate controversies within this Court's exclusive original jurisdiction; and (b) because the state taxing officials who necessarily will be the principal defendants in such actions are not citizens of a state under the diversity statute and thus are not within the jurisdictional perimeters of the Federal Interpleader Act. It is not *suitable* because federal interpleader will in most cases force contending states to litigate their death tax claims before jurors who are citizens of a rival claimant state.

A. The Federal Interpleader Act Cannot Give a District Court Jurisdiction To Consider Death Tax Domicile Controversies Between States Because Such Cases Are Within This Court's Exclusive Original Jurisdiction.

The use of federal interpleader to resolve the conflicting domicile claims of two states conflicts with 28 U.S.C. § 1251(a) which gives the Court "original *and exclusive* jurisdiction of *all* controversies between two or more States." (Emphasis added). The very purpose of the interpleader actions envisioned by the concurring opinions in *California v. Texas* is to eliminate the possibility of multiple taxation. *See California v. Texas*, 437 U.S. at 608 n.9 (Stewart, J., concurring). This necessarily means that, if one state wins, the other loses. Interpleader thus locks the competing states in an adversarial position, and so creates an interstate controversy of the most concrete kind. Since such controversies must, by law, be

resolved exclusively by this Court,[8] the use of interpleader jurisdiction in a federal district court for that purpose is improper.[9]

The escheat cases decided by the Court support this proposition. In *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951), the Court stated that one state's claim against another for escheated property could only be maintained within the original jurisdiction. *Id.* at 443. And, despite the unsupported suggestion in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), that such controversies might "under some circumstances" be referred to the district courts (*id.* at 79), the Court has consistently accepted jurisdiction of cases where

---

[8] The statutory grant of exclusive jurisdiction to the Court over "*all* controversies between two or more States" (emphasis added) so obviously precludes other courts from adjudicating such disputes that it is not surprising to find a dearth of authority in this Court supporting the proposition that the statute means what it says. When attempts have been made to file cases within the Court's original and exclusive jurisdiction in the lower courts, however, they have been unequivocally rejected. *State Water Control Bd. v. Washington Suburban Sanitary Comm'n*, 61 F.R.D. 588 (D.D.C. 1974); *Friedberg v. Santa Cruz*, 86 N.Y.S.2d 369, 274 App. Div. 1072 (1949); *DeMiglio v. Paez*, 189 N.Y.S.2d 593, 18 Misc. 2d 914 (1959).

Arizona v. New Mexico, 425 U.S. 794 (1976), is not to the contrary. There the Court denied Arizona leave to file a bill of complaint seeking to invalidate a tax imposed by New Mexico on the New Mexico generating facilities of three Arizona utilities. The Court held that resort to the original jurisdiction was unnecessary, because the issues which Arizona sought to tender to the Court were being litigated in the New Mexico state courts by the affected utilities. The Court also was "not unmindful that the legal incidence of the electrical energy tax [was] upon the utilities" (*id.* at 797-98), not the state itself. A real interstate controversy thus probably was not present.

The present case is quite different. Here there is no doubt that it is the state itself—and not a third party—which is the real party in interest, since if Texas prevails in the interpleader action, the money which California directly receives by way of inheritance taxes will be adversely affected. Nor does California have any surrogates—like the Arizona utilities in *Arizona v. New Mexico*—to plead its case in some other forum, even if one were otherwise available.

[9] Even if such cases met the jurisdictional prerequisites of the Federal Interpleader Act—a matter discussed in the next subsection—28 U.S.C. § 1251(a) would prevent the district court from entertaining them. The specific jurisdictional statute—in this case, the one that reserves interstate controversies to this Court—controls over the general. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973).

several states sought to escheat the same property. *Texas v. New Jersey*, 379 U.S. 674 (1965); *Pennsylvania v. New York*, 407 U.S. 206 (1972). If an interstate controversy within this Court's exclusive original jurisdiction is created when two states attempt to escheat the same property, such a controversy is no less present when two states are forced to litigate their domicile claims against each other.[10]

B. Jurisdiction Cannot Be Invoked Under the Federal Interpleader Act to Resolve Death Tax Domicile Controversies Between States Because States Are Not "Citizens of a State" for Purposes of Diversity and Interpleader Jurisdiction.

Even if such interstate disputes were not within the Court's original and exclusive jurisdiction, they do not fit within the Federal Interpleader Act. Federal interpleader requires that the parties to the action include at least two "adverse claimants, of diverse citizenship as defined in [28 U.S.C.] section 1332" who are claiming money in Plaintiff's custody or possession. The identity and citizenship of the "claimants" in turn depend on the identity of the real parties in interest, since it is the citizenship of the real parties, not that of the nominal ones, which controls for diversity purposes.[11]

---

[10] Justice Stewart's concurring opinion in *California v. Texas* states that the real controversy in double domicile cases is between each taxing state and the estate, not between the states themselves. 437 U.S. at 611-12. Whatever the merits of this view before the invocation of an interpleader action, it surely cannot be the case *after* interpleader is invoked. Once that occurs, the states will necessarily be combatants vis-a-vis each other, since their claims are mutually inconsistent and both cannot prevail. Indeed, in some cases of this type (*i.e.*, where the tax rates of the two states are the same), the *only* controversy will be between the taxing states. *See* p. 11, *infra*.

Nor does the fact that the interstate controversy arises only in the "second stage" of the interpleader action (*i.e.*, when the interpleader claimants litigate their claims against one another) remove the jurisdictional bar against hearing such cases in a federal district court. The grant of exclusive jurisdiction to this Court prohibits other forums from entertaining "*all*" interstate controversies, regardless of the stage in the proceedings when they arise. *State Water Control Bd. v. Washington Suburban Sanitary Comm'n*, 61 F.R.D. 588 (D.D.C. 1974) (motion to intervene partially denied where grant would create interstate controversy and oust the district court of jurisdiction).

[11] WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE (hereafter

(footnote continued on following page)

While the Complaint in this action named as Defendants the taxing officials of California and Texas, it is readily apparent that the real parties in interest—and thus the true interpleader "claimants"—are the taxing states themselves, which will receive any taxes collected if they prevail or be restrained from collecting taxes if they do not. States, however, are not "citizens of a state" for diversity purposes (*Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482 (1894)), and neither are state taxing officials sued in their stead.[12] The District Court thus held that the Texas taxing officials named as defendants in this action were not "citizens of a state" who could support jurisdiction. App. 4d. This holding was not questioned by the Court of Appeals.

Because of these jurisdictional principles, interpleader jurisdiction can be successfully invoked in such cases only if the plaintiff can show the existence of two parties *other* than state taxing officials who are both adverse claimants to the fund at issue, and also citizens of a state. This will rarely occur, since the proper parties to such cases will normally include only the estate (represented by an executor or administrator) and the several claimant states. Thus, in the prototypical dispute of this kind—between an executor and several states—interpleader jurisdiction will be unavailable.

The Court of Appeals' finding of interpleader jurisdiction in *this* case was based on a combination of unlikely factual circumstances and incorrect conclusions of law. Out of all the

---

(footnote continued from previous page)

"Wright"), Civil § 1556, p.710 ("The general rule is that the citizenship of the real party in interest is determinative in deciding whether diversity jurisdiction exists"); 3A MOORE'S FEDERAL PRACTICE ¶17.04, pp.17-27. *Wormley v. Wormley*, 8 Wheat. (21 U.S.) 421 (1823).

[12] *See State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194 (1929) (state commission held to be "alter ego" of state and thus not a citizen for diversity purposes). As to taxing officials specifically, *see People ex rel McColgan v. Bruce*, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942); *Craig v. S. Natural Gas Co.*, 125 F.2d 66 (5th Cir. 1942); *Riley v. Worcester County Trust Co.*, 89 F.2d 59 (1st Cir. 1936), *aff'd on other grounds*, 302 U.S. 292 (1937); *Robertson v. Ingram-Day Lumber Co.*, 271 F. 1023 (5th Cir. 1921); *Robertson v. Jordan River Lumber Co.*, 269 F. 606 (5th Cir. 1921); *Kansas City Southern R.R. Co. v. Morley*, 88 F. Supp. 300 (W.D. Ark. 1950); *Query v. 206 Cases of Assorted Liquor*, 49 F. Supp. 693 (W.D.S.C. 1943).

parties named, it found only *two* which it regarded as "claimants" who were also "citizens" of diverse states. It first held that if a stakeholder is "interested" in the fund—that is, if it also asserts an entitlement to it—then it is also a "claimant" whose citizenship can be considered for jurisdictional purposes. App. 11a. The court concluded that Respondent Lummis, as the Texas Administrator, met these criteria. *Id.* As for the second of the two necessary diverse claimants, the court seized upon Petitioner Alvord, the County Treasurer of Los Angeles. Under the prior law of California, the death tax was paid to the county treasurer, who retained a small percentage as a commission and remitted the balance to the State. *See* note 3, *supra.* But, as we shall now show, the Court of Appeals' analysis certainly provides no basis for ever again utilizing the Federal Interpleader Act as a means of resolving controversies of this kind, and is seriously flawed even as applied to this case.

First, the Court of Appeals' finding that the Texas Administrator is an "interested" claimant rests on the fact that since the applicable tax rates of California are higher than those of Texas, the Estate has an interest in the determination of domicile for death tax purposes. But if all the states seeking to assert inheritance taxes against an estate would apply the same tax rate, the estate would be a disinterested stakeholder whose citizenship could *not* be considered in determining interpleader jurisdiction. *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939). The same would be true if all the states were among the many whose tax rates were equal to or below the amount allowed as a credit against the federal estate tax. The only claimants in such cases would be the states themselves and interpleader jurisdiction could not be established. This case was different only because the California tax rate (24%) exceeds the Texas tax of 16%.

Second, the holding of the Court of Appeals that the citizenship of an interested stakeholder can be considered for purposes of establishing interpleader jurisdiction is incorrect, and would lead to a radical and wholly unwarranted expansion of federal jurisdiction. *See* Part II, *infra.* But unless the citizenship of an interested stakeholder may be considered in meeting the jurisdictional prerequisites of the Federal Interpleader Act, that statute will not be available to resolve interstate death tax controversies.

Third, even if the stakeholder is interested and may properly be considered as a "claimant" for jurisdictional purposes, a second diverse "claimant" must be found. The Court of Appeals found such a claimant in this case due to the happenstance that, at the time the Complaint was filed, the County Treasurer of the County of Los Angeles stood to receive a tiny percentage of the Hughes Estate if Hughes were ultimately determined to have been a California domiciliary. *See* note 3, *supra*. But this feature of California law has now been repealed. *See* note 7, *supra*. Thus, if a case identical to this one arose tomorrow, interpleader jurisdiction would be unavailable. And, for reasons fully explained in Part III, *infra*, that statutory change destroyed any jurisdiction that may once have existed in the present case.

It bears emphasis that *each* of these factors was necessary to the Court of Appeals' decision and that, without *any* of them, jurisdiction would not have been established, even if the prior California law giving the County Treasurer a share of the Estate had not been repealed. If, in a future case, the estate is disinterested or neither state happens to share its tax proceeds with a local official, interpleader will not lie. Nor will interpleader be proper in any such case if the Court were to hold that the citizenship of an interested stakeholder may not be considered for purposes of determining interpleader jurisdiction. *See* Part II, *infra*. Interpleader will rarely, if ever, be an available remedy for the resolution of death tax controversies between states.

C. Interpleader Should Not Be Used to Resolve Death Tax Domicile Controversies Between States Because It Requires States to Submit Their Tax Claims to Jurors Who Will Be Citizens of a Rival Claimant State.

Interpleader is also an unsuitable means to resolve death tax controversies between states because the inevitable effect of provisions drafted without that use in mind is that such cases will be decided by jurors who are citizens of one of the claimant states. 28 U.S.C. §1397 provides that an interpleader action may be brought in any judicial district where one or more claimants reside. Ordinarily, *all* the potential claimants will

reside in one or the other of the states which claims to be the domiciliary state and no neutral forum will be available. In such cases, venue will be proper—as far as the statute is concerned—only in one of the claimant states. And the estate which invokes interpleader will be able in all cases to lay venue in the state with the lowest death tax rate, giving that state a decided advantage over the other state.

Thus in most cases, as in this, interpleader will force one of the competing states to submit its tax claim for judgment by jurors of a rival state.[13] A greater affront to federalism is difficult to imagine. Throughout our history it has been regarded as inappropriate to compel a state to resort to the tribunals of another state for redress. *Cf. Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971) (cataloguing reasons behind grant of original jurisdiction for suits between states and citizens of other states); *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 288 (1888) (same); *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419, 475-76 (1793) (same); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1681 (4th ed. 1873) (reasons for exclusive jurisdiction of Supreme Court over interstate controversies). That reluctance should be greatly intensified where, as in this case, the dispute is between two states, and the tribunal sits in one of them. California should not have to litigate its dispute with Texas before a jury of Texas citizens. *See* Part IV, *infra*.

Unfortunately, a district judge persuaded that such a controversy should be heard in a neutral forum will ordinarily be unable to achieve that end. 28 U.S.C. § 1397 requires the suit to be brought where one of the claimants resides. Except in an unusual case in which other claimants, residing elsewhere, are also joined, transfer under 28 U.S.C. § 1404(a) will not be possible. That section allows transfer only to a district in which the action "might have been brought." *See Hoffman v. Blaski*,

---

[13] Jury trial is quite likely to be available as of right in this action. *Ross v. Bernhard*, 396 U.S. 531 n.15 (1970) (jury trial right may be applicable to legal issues presented in interpleader action despite equitable nature of remedy); *Lipscomb v. Lipscomb*, 265 F.2d 822 (D.C. Cir. 1959); *Shafer v. Children's Hosp. Soc'y*, 265 F.2d 107 (D.C. Cir. 1959) (jury trial required to decide issue of decedent's domicile). *Cf.* 28 U.S.C. §§ 1346(a)(1), 2402 (jury trial right available in action contesting federal taxes).

363 U.S. 335 (1960). This is yet another illustration of how poorly suited is the Interpleader Act for the task of resolving conflicting state death tax claims.

For these reasons, interpleader is the wrong remedy for adjudicating multiple domicile-based death tax claims. The proper remedy is the exercise of this Court's original jurisdiction. That jurisdiction is fully responsive to the delicate issues of interstate comity inherent in the adjudication of such disputes, since this Court is uniquely suited to provide a neutral forum for resolving interstate controversies. Moreover, the invocation of the original jurisdiction is not affected by chance events which have no bearing on the justiciability of the controversy, such as whether a state's inheritance tax is shared with a local official.[14] It is for these reasons that California has filed, together with this Petition, a Motion for Leave to File Complaint which we urge the Court to consider in tandem with this Petition. *See* note 1, *supra*. Granting the Petition so that argument on the merits would occur at the same time as argument on the motion would afford the Court an opportunity to settle once and for all the troublesome question of how these disputes should be resolved.[15]

---

[14] To be sure, the invocation of the original jurisdiction under *Texas v. Florida* depends on whether the competing states' claims plus that of the Federal Government threaten to deplete the estate's assets. But hinging this Court's jurisdiction on the likelihood of depletion of the estate is quite logical. Only if the competing tax claims exceed 100% of the estate does each state's claim pose a threat to (and thus create a controversy concerning) the tax claim of the other state. If both states can be satisfied from the estate's assets, each state may collect and enforce a judgment and there is thus no interstate controversy.

[15] Conversely, denying certiorari may well send a misleading signal to state taxing officials and executors and administrators of estates threatened with multiple taxation. Because this is the first double domicile case following *California v. Texas* and because of the publicity which proceedings involving Howard Hughes seem to generate, the denial of certiorari will doubtless be read by executors and state taxing officials, and their lawyers, as approval by this Court of the use of federal interpleader to resolve interstate death tax controversies. States may therefore fail to take actions which could pretermit such cases, *e.g.*, signing the Uniform Act on Interstate Arbitration of Death Taxes, while attorneys doing premortem counseling may refrain from advising their clients to avoid living so as to create double domicile problems out of a false sense of security that federal interpleader will be available to prevent multiple taxation. For the reasons discussed in text, however, interpleader will not be available to resolve these problems, except in the most unusual cases.

To be sure, the Court of Appeals in this case found federal interpleader jurisdiction to exist and thus at least superficially solved the problem of providing a federal forum for resolution of *this* interstate death tax controversy. For the reasons already stated, however, the unique circumstances of this case which led the Court of Appeals to find jurisdiction will not be repeated; the decision below is thus an "adjudication[ ] . . . in[ ] the same class as a restricted railroad ticket, good for this day and trip only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). Moreover, as we shall now show, the price of this result was the distortion of hitherto accepted principles of federal jurisdiction, federalism, and orderly appellate procedure. *First*, the Court of Appeals held that an interested stakeholder is a "claimant" for purposes of the Federal Interpleader Act, a result which, though seemingly innocuous, poses an immediate threat of a radical and unwarranted expansion of federal jurisdiction. *See* Part II, *infra*. *Second*, the Court of Appeals improperly refused to consider the effect on its decision of a supervening change in California law which destroyed the basis for federal jurisdiction of this action, in violation of a decision of this Court. *See* Part III, *infra*. *Third*, the Court's holding that the District Court did not abuse its discretion in refusing to transfer this action to a forum whose residents would have no interest in the outcome ensures that the competing tax claims against this massive estate will occur in a forum whose residents—and thus whose jurors—may not be impartial and will certainly not appear to be so. *See* Part IV, *infra*. These considerations warrant the grant of certiorari whatever the ruling on the Motion for Leave to File Complaint.

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' HOLDING THAT THE CITIZENSHIP OF A STAKEHOLDER SHOULD BE CONSIDERED IN DETERMINING WHETHER INTERPLEADER JURISDICTION EXISTS, A RULING WHICH RADICALLY EXPANDS FEDERAL JURISDICTION.

The Court of Appeals sustained interpleader jurisdiction because it found that Respondent Lummis' citizenship (Nevada) was diverse to that of the County Treasurer of Los Angeles (California), and that both Lummis and the County

Treasurer were "claimants" under the Federal Interpleader Act. App. 11a-12a. In so holding, the court explicitly held that the citizenship of an interpleader plaintiff who, in addition to being a stakeholder, also claims an interest in the fund may be considered for purposes of determining whether interpleader jurisdiction exists. *Id.* 11a. Because jurisdiction under the Federal Interpleader Act is premised upon the existence of at least two adverse claimants of diverse citizenship, the decision below necessarily means that the conflicting claims of just *one* interested plaintiff and *one* defendant to a specific fund are a sufficient basis for jurisdiction under the Act. This holding would have a radical, and plainly undesirable, effect on fundamental principles of federal jurisdiction, as several examples illustrate.

First, consider the case in which an insurance company or other institution holds a sum of money which is claimed by X, and X alone. The insurer, a citizen of State A, disputes the claim of X, a citizen of State B. Under the Court of Appeals' opinion, the insurer (which is "interested in" the funds it holds by virtue of its challenge to X's claim) would be a "claimant" of diverse citizenship to X, also a claimant, and could invoke federal jurisdiction under the Federal Interpleader Act. Why should this be permitted? These hypothetical facts describe a garden-variety dispute between two parties which could be settled in state court, or a federal court under general diversity jurisdiction if the $10,000 jurisdictional minimum is satisfied. But if interested stakeholders are "claimants," then nearly every bilateral dispute could be framed to invoke federal interpleader jurisdiction, thereby obtaining for the plaintiff nationwide service of process (28 U.S.C. § 2361) and a greatly reduced jurisdictional minimum. *Compare* 28 U.S.C. § 1332(a) *with id.* § 1335(a)($500 jurisdictional minimum).

Second, if an interested stakeholder is a "claimant" for purposes of Section 1335, it must also be a "claimant" for purposes of venue under Section 1397, which provides that statutory interpleader actions must be brought where one or more claimants reside. By alleging an interest in the fund, the stakeholder could bring the action in the place of its own residence. Thus if a Delaware insurer who altogether denies liability seeks to interplead a dozen claimants all residing in

California (or there, Washington and Oregon), it could compel them to litigate their claims in Delaware, without regard to their prior contacts with that state.

Third, as the first example demonstrates, the jurisdictional minimum of Section 1332 would be largely frustrated. Virtually *every* "rule interpleader" action, previously thought to have been based on general diversity, could be recast under the Federal Interpleader Act whenever the stakeholder is interested in the fund.[16] There is no indication that Congress intended the Act wholly to displace interpleader actions brought under the usual diversity jurisdiction of the district courts where the $10,000 jurisdictional minimum is not present and where there is no special need for a federal forum with nationwide service. Yet that would be the inevitable result of the Court of Appeals' reinterpretation of Section 1335.[17]

These serious, adverse consequences of the lower court's holding would not be accompanied by any measurable benefits. Even if the citizenship of the stakeholder administrators who would ordinarily bring an interpleader action to resolve an interstate death tax controversy could be considered for jurisdictional purposes, interpleader jurisdiction could not be successfully invoked unless the administrators also named a defendant who was simultaneously both a "claimant" and a "citizen of a state." For the reasons discussed in Part I, *supra*, the state taxing officials named as defendants will not be able to fill this jurisdictional lacuna. While the Court of Appeals in this case found that such an additional defendant existed in the person of the County Treasurer of Los Angeles, this finding was premised on California statutes, since repealed, which gave the County Treasurer a tiny percentage of the Estate if Hughes

---

[16] The prototypical rule interpleader case is one in which the plaintiff-stakeholder is in State A and defendants-claimants are co-citizens of State B. Such actions fall comfortably within Section 1332 so long as the $10,000 jurisdictional requirement is satisfied.

[17] Neither the cases cited by the Court of Appeals (*Builders & Developers Corp. v. Manassas Iron & Steel Co.*, 208 F. Supp. 485, 488 (D. Md. 1962) and *Pan Am. Fire & Cas. Co. v. Revere*, 188 F. Supp. 474, 477 & n.8 (E.D. La. 1960)), nor Professor Wright, upon whom the court below also relied (App. 11a), appear to have considered most of these serious disruptions to the federal jurisdictional scheme which would be caused by treating an interpleader plaintiff as a claimant for jurisdictional purposes.

were adjudged ultimately to have been a California domiciliary. But, as shown above, this "solution" to this jurisdictional problem will not be available in future disputes of this kind. *See* pp. 11-12, *supra*. Thus, even if one assumed that the greatly increased burdens on the federal judiciary created by the Court of Appeals' interpretation of the interpleader statute could be justified in the interest of sparing this Court's original jurisdiction of the necessity to resolve interstate death tax disputes by providing an alternative forum, no such benefit will in fact be attained. Certiorari should therefore be granted to prevent the radical and unwarranted expansion of federal jurisdiction which the Court of Appeals opinion would cause, if left to stand.

III.
THE WRIT SHOULD ISSUE BECAUSE THE COURT OF APPEALS' FINDING OF JURISDICTION HAS BEEN SUPERSEDED BY CHANGES IN CALIFORNIA LAW.

As noted above, the Court of Appeals found interpleader jurisdiction to exist in this case because it found the requisite minimal diversity between Respondent Lummis, the Texas Administrator, and Petitioner Alvord, the County Treasurer of the County of Los Angeles. Jurisdiction was thus found to exist in this case solely because of the unusual circumstance that, under California law at the time the Court of Appeals opinion was rendered, the *state* death tax was collected by a *county* treasurer, who retained a tiny fraction of the tax as compensation for that administrative service and was required to remit the balance to the State of California. Because the citizenship of a county officer, unlike that of a state officer, may be considered for diversity purposes, Petitioner Alvord was held to be a claimant and a citizen of California, of diverse citizenship with Respondent Lummis.

On January 1, 1981, however, California law regarding inheritance tax procedure was completely revised. On that date, AB 2092 (Chapter 634 of the California Statutes of 1980), became effective. This statute repealed Sections 14791-95 of the California Revenue and Taxation Code (which previously had provided for payment to the County Treasurer

of the inheritance tax, retention by him of a "commission" and transmittal to the state of the balance) and amended Calif. Rev. & Tax. Code §14104 to require payment of the tax to the State Controller. *See* App. 19i, 36i. These statutory changes eliminated Petitioner Alvord's interest in the Hughes inheritance tax, as he is no longer entitled to receive a portion of any inheritance tax paid after January 1, 1981.[18] *Id.* 38i.

Whatever may have been the case when the Court of Appeals rendered its original decision, it is now clear that Alvord is no longer a claimant to any portion of the funds which are the subject of the interpleader action, i.e., the Hughes Estate. In the language of the Interpleader Act, Alvord is no longer a person who is "claiming or may claim to be entitled to . . . money or property" in the stakeholder's custody or possession. Because Alvord is no longer a "claimant," he is not a proper party and the action against him must be dismissed. The required presence of at least two adverse claimants of diverse citizenship does not now exist, and federal interpleader jurisdiction thereby fails. *See Kennametal, Inc. v. International Union*, 161 F.Supp. 362 (W.D. Pa. 1958)(abandonment of claim by one of two claimants terminates jurisdiction under §1335); *Dakota Livestock v. Keim*, 552 F.2d 1302, 1306 (8th Cir. 1977).

It has long been settled that where the addition or deletion of a party *after* the complaint has been filed affects the existence of diversity of citizenship, jurisdiction must be redetermined in light of that changed circumstance. This principle has been applied in a wide variety of contexts:

> (1) The joinder of additional defendants whose citizenship is the same as the plaintiff will destroy diversity jurisdiction. (Accordingly, the courts often state that such

[18] Although legislative "motive" is irrelevant to any issue before this Court, we nevertheless wish to assure the Court that the 1980 revision to California's inheritance tax law—and specifically the elimination of the county treasurer's participation in death tax collections—was entirely independent of this case and made without any consideration (or even appreciation) of the effect it would have on federal interpleader jurisdiction here. As can be seen from an examination of the legislation (which is reprinted as Appendix I) the revisions are extensive. The particular provisions concerning the role of the county treasurers had been proposed for many years. Special counsel for California played no role, direct or indirect, in the formulation of this legislation.

joinder should not be allowed or required unless such defendants are indispensable parties.)[19]

(2) Similarly, the joinder of an additional plaintiff who is a citizen of the same state as a defendant will oust the court of jurisdiction.[20]

(3) Conversely, when after the filing of the complaint the plaintiff undertakes to correct an absence of jurisdiction by dismissing non-diverse defendants, jurisdiction will be re-determined following such dismissal.[21]

(4) Where the original complaint includes two or more plaintiffs, of whom some are citizens of the same state as a defendant, the jurisdictional defect can be eliminated by dismissing the non-diverse plaintiff(s), following which jurisdiction is re-determined.[22]

(5) Intervention of an indispensable party who is a citizen of the same state as the intervenor's opposing party destroys diversity jurisdiction, as measured at the time of intervention.[23]

---

[19] *E.g., Clarkson Co., Ltd. v. Shaheen,* 544 F.2d 624, 628-29 (2d Cir. 1976); *Haas v. Jefferson Nat. Bank,* 442 F.2d 394 (5th Cir. 1971)(dismissal after District Court had ordered joined an indispensable party whose presence destroyed diversity); *Reynolds v. Wabash R.R. Co.,* 236 F.2d 387 (8th Cir. 1956); *Wallace v. Knapp-Monarch Co.,* 234 F.2d 853, 860 (8th Cir. 1956).

[20] *E.g., Adams Express Co. v. Denver & Rio Grande Ry.,* 16 F. 712 (C.C.D. Colo. 1883); *cf. Gaddis v. Junker,* 27 F.2d 156, 159 (E.D. Tex. 1928)(treating intervenors who joined with the cooperation of plaintiffs as "in the category of plaintiffs" and holding that their joinder destroyed diversity jurisdiction); *Forest Oil Co. v. Crawford,* 101 F. 849 (3d Cir. 1900)(same).

[21] *E.g., Publicker Indus., Inc. v. Roman Ceramics Corp.,* 603 F.2d 1065, 1068-69 (3d Cir. 1979); *Fetzer v. Cities Serv. Oil Co.,* 572 F.2d 1250, 1253 n.4 (8th Cir. 1978); *Ralli-Coney, Inc. v. Gates,* 528 F.2d 572, 575-76 (5th Cir. 1976); *Finn v. Am. Fire & Cas. Co.,* 207 F.2d 113 (5th Cir. 1953), *cert. denied,* 347 U.S. 912 (1954). In *Finn,* this Court had determined on a prior appeal after a trial that the District Court lacked diversity jurisdiction; on remand, the District Court dismissed the non-diverse defendant and reinstated the judgment. The Court of Appeals held that by doing so, the District Court cured the lack of jurisdiction.

[22] *E.g., Alderman v. Elgin, J. & E. Ry. Co.,* 125 F.2d 971 (7th Cir. 1942); *Drumright v. Texas Sugarland Co.,* 16 F.2d 657 (5th Cir.), *cert. denied,* 274 U.S. 749 (1927); *Allstate Ins. Co. v. Lumbermen's Mut. Cas. Co.,* 204 F. Supp. 83 (D. Conn. 1962).

[23] *Chance v. County Bd. of School Trustees,* 332 F.2d 971 (7th Cir. 1964); *Kentucky Natural Gas Corp. v. Duggins,* 165 F.2d 1011, 1015 (6th Cir. 1948); *Kendrick v. Kendrick,* 16 F.2d 744, 745 (5th Cir. 1926), *cert. denied,* 273 U.S. 758 (1927); *Fryer v. Weakley,* 261 F. 509 (8th Cir. 1919).

(6) Permissive intervention of a non-indispensable party who is a citizen of the opposing party's state also destroys jurisdiction.[24]

In short, the presence or absence of diversity jurisdiction is re-determined *after* there has been an addition or elimination of a party.[25] The Court of Appeals was therefore required, at least, to consider the effect on its jurisdiction of the changes in California statutory law which effectively removed Petitioner Alvord's interest in the litigation.

It did not do so. The California statute revising the state's inheritance tax procedures had not been enacted at the time of

---

[24] *E.g., Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685, 688 (5th Cir. 1954); *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 197 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952)(allowing State of Texas to intervene was error because it was not a "citizen of a state" and, if uncorrected, its "presence would destroy the jurisdiction of the court"); *Johnson v. Riverland Levee Dist.*, 117 F.2d 711, 715 (8th Cir. 1941)(intervention with consent of plaintiff by a party residing in same state as defendant "destroys the jurisdiction of the court"); *Forest Oil Co. v. Crawford*, 101 F. 849 (3d Cir. 1900).

A different rule exists where the suit is a class action and the intervenor is a member of the class or where the controversy between the intervenor and the opposing parties is "ancillary" to the main action (as when the intervention is "as of right" under F.R. Civ. P. 24(a)). Neither of these rules is applicable here, either directly or by analogy. This is not a class action, and there is no "ancillary" dispute, the only issue before the Court being that of the domicile of Hughes for inheritance tax purposes.

[25] A different rule applies when there is a *pro forma* substitution of one party for another, as where a party dies and his or her executor is substituted in. But even this rule does not govern where the substitution changes the nature of the action or the nature of the right asserted therein, in which event jurisdiction is re-determined as of the time of substitution. *Grady v. Irvine*, 254 F.2d 224 (4th Cir. 1958), *cert. denied*, 358 U.S. 819 (1958); *see also Rippey v. Denver U.S. Nat'l Bank*, 42 F.R.D. 316 (D. Colo. 1967).

Professor Wright's Treatise states that "a change of parties, by addition, substitution, or elimination . . . will not divest the court of jurisdiction if the nature of the action remains the same . . . ." Wright, *supra*, § 3608, pp. 656-57. A careful reading of this section suggests that Professor Wright is referring here to the rules applicable to (1) *pro forma* substitution, as discussed in the preceding paragraph (*see* 13 Wright, *supra*, at 659-60; and (2) the addition of parties as a consequence of the *defendant's* action, as by impleader, compulsory counter-claim or cross-claim, which is treated as within the *ancillary* jurisdiction of the court. *See id.* at 657. Professor Wright does not suggest that the rules outlined in text are any different than those stated here.

briefing or oral argument in the Court of Appeals and did not become effective until the court's decision had been rendered and the time for rehearing had run. The revisions were promptly brought to the attention of the court by means of a petition for rehearing coupled with a motion for leave to file that petition out of time. The motion, however, was summarily denied. App. "C". That summary denial "so far depart[s] from the accepted and usual course of judicial decisions" and from the teaching of this Court, so as "to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a).

The principle which should have guided the Court of Appeals—in addition to the cases just cited—was enunciated in *Huddelston v. Dwyer*, 322 U.S. 232 (1944). In that case, after the Court of Appeals had issued its initial decision and denied a timely petition for rehearing, the state supreme court overruled the state law upon which the court of appeals decision had relied. As in this case, Petitioners moved to file a second petition for rehearing based on the intervening decision, which the Court of Appeals denied. This Court granted certiorari and vacated the Court of Appeals' decision, holding that the change in state law "at least raised such doubt as to the applicable . . . law as to require its reexamination, . . .". *Id.* at 236-37. The summary refusal by the Court of Appeals to consider the effect of the change in California law brought about by AB 2092 was thus in violation of this Court's teaching in *Huddleston*.

The Court of Appeals' refusal to consider the recent change in California law and its upholding of jurisdiction on the ground that Alvord was a "claimant" when the complaint was filed, is not only contrary to *Huddleston* and the cases summarized above, but has also lead to a bizarre result: jurisdiction has been sustained because of the happenstance that, under the law as it stood on the date the complaint was filed, Alvord held a tiny fraction of the California tax claim even though (1) the law has subsequently changed, and Alvord no longer holds any such claim or has the slightest interest in this case; (2) there is now only *one* proper party—the Texas Administrator—who could conceivably qualify as both a "claimant" and a "citizen" of a state under the Interpleader Act (and his citizenship may only be considered at the cost of

radically expanding federal jurisdiction); (3) if an identical case arose tomorrow, it could not be brought in the district court under the Interpleader Act; and (4) all of this became clear before any final determination of the issue of jurisdiction in a case which has not yet passed beyond the pleading stage. The present posture of this case thus highlights the jurisdictional barriers to the use of the Interpleader Act as a means of resolving multi-state domicile-based death tax disputes.

IV.

THE WRIT SHOULD ISSUE TO REVIEW THE COURT OF APPEALS' DECISION REQUIRING CALIFORNIA, A SOVEREIGN STATE, TO SUBMIT ITS TAX CLAIM TO A JURY COMPOSED OF CITIZENS OF TEXAS, A RIVAL STATE.

If, despite the arguments previously advanced, this case is to be heard in a federal district court pursuant to the Federal Interpleader Act, the procedures used must be responsive to the unique characteristics of this dispute. In particular, the trial of this case should occur in a forum whose citizens—and thus whose veniremen—have no stake in the outcome of the controversy and no emotional attachment to the interest of any party. Such a "neutral forum" is available in this case: The District of Colorado.[26]

---

[26] The ability of this Court to order the action transferred to Colorado is dependent on the joinder as defendants of the twenty-two heirs whom the Administrators themselves have recognized as having legitimate claims. Under 28 U.S.C. § 1404(a), an action may only be transferred to a district where it might have been brought. If the heirs were added, however, the judicial districts in which they reside—which include the District of Colorado—would become permissible transferee forums since the action as it would then stand could have been brought in those districts in the first instance.

The heirs must be joined, in any event, in order to protect California against relitigation of the domicile issue in the California state courts. Even if California prevailed in the interpleader action, California law makes heirs indispensable parties to inheritance tax proceedings (*Allen v. Flournoy*, 26 Cal. App. 3d 774, 103 Cal. Rptr. 275 (1972)), and the California courts might well conclude that the heirs were not bound by the federal adjudication since they were not parties thereto. Indeed, even if one accepted the view of the Court of Appeals that the heirs need not be joined because they are in privity with the Administrators who are parties, Rule 19(a)(2)(i) requires

(footnote continued on following page)

28 U.S.C. §1404(a) allows the transfer of a civil action to any court in which the action "might have been brought" in "the interest of justice." The interest of justice requires that this action be heard in a forum which no party contends was the domicile of Howard Hughes.

The present action is based upon the conflicting tax claims of two states; it is a controversy between Texas and California over the domicile of Howard Hughes. Even if this case is held not to be an interstate controversy within the Court's exclusive original jurisdiction, the delicate nature of the adjudication the Estate seeks is indisputable. Proceedings in the courts of California and Texas have been enjoined. The collection of taxes has been restrained. And two sovereign states are being asked to adjudicate their conflicting tax claims in a single proceeding in a federal trial court.

This ineluctable entrenchment on state sovereignty is surely heightened by the fact that, unless overturned, the Court of Appeals' decision will force one state to litigate its claim against another before a jury composed of citizens of the latter state. As we have already shown (at page 13, *supra*), this result is incompatible with the concern for state sovereignty and the respect for each state's dignity which underscores the grant of original and exclusive jurisdiction to this Court to resolve controversies between states.

Acceptance of this argument would require transfer to a neutral forum (if one were available under 28 U.S.C. §1397) in every interstate interpleader brought to resolve multistate death tax claims. But there are several additional factors specific to this case which, taken together, show that even if a neutral

---

(footnote continued from previous page)

joinder of persons who are in privity with those already parties because their interests will be affected by the outcome of the dispute. *Bry-Man's, Inc. v. Stute*, 312 F.2d 585 (5th Cir. 1963).

While we do not argue that the joinder issue, standing alone, is of sufficient importance to be a separate ground for issuance of the writ, should the Court grant certiorari, the heirs should be joined to permit transfer of the action to a neutral forum and to insure that interpleader jurisdiction, if upheld, will achieve its intended purpose of precluding multiple litigation of the domicile issue. Because changing venue is dependent on joinder of the heirs, the latter question is "fairly included" (Sup. Ct. R. 21.1(a)) within the former and we therefore intend to brief and argue the joinder issue if certiorari is granted.

forum is not required in all such cases, the Court of Appeals abused its discretion and impermissibly violated Petitioners' constitutional rights when it refused to order a transfer.

(a) *Pecuniary Interest of Finders of Fact.* The ultimate fact-finders in this litigation, if citizens and taxpayers of Texas (or, for that matter, California) will have a direct pecuniary interest in the outcome. The California inheritance tax referee has found the value of the Estate to be approximately $1.1 billion. If this value is accurate, the Texas death taxes would be approximately $158 million. Because there are approximately 12.8 million residents of Texas according to the most recent projections, each resident of Texas would stand to gain an average of $12.34 if there were a finding of Texas domicile. Moreover, because the funds generated by the Texas inheritance tax are maintained in the State's "General Revenue Fund" which is "the major state operating fund from which most agencies are financed" (*State of Texas 1977 Annual Financial Report* 18-19 (R.I., 99 and Exhibit E)), there is no doubt that the taxes Texas seeks here will inure to the benefit of its citizens, either through increased public services or a tax reduction. The magnitude of this potential tax recovery is underscored by the fact that it alone would represent approximately 7.9% of the $2.2 billion total tax revenues contributed to the state's general revenue fund in fiscal 1977. Indeed, the *total* inheritance tax receipts for the State of Texas for the fiscal year ending August 31, 1977 amounted to only $66.6 million, far less than the tax at issue here.[27]

---

[27] Moreover, in the ordinary tax case, there are only two sides: the state and the taxpayer. Jurors are both citizens and taxpayers. While they have an interest in maximizing their state's revenue (and the courts have recognized that appeals to the pecuniary interests of juries in tax cases are improper, *see, e.g., Epperson v. United States,* 490 F.2d 98 (7th Cir. 1973)), jurors may also have sympathy as taxpayers for the individual or corporation against whom the tax is being asserted. Hence jurors bring to the ordinary tax case no preconceptions which might tip the scales of justice. But because this case is at bottom an *interstate* controversy, there are three relevant parties, not two: Texas, California and the Estate. A Texas juror might, as a Texan, be sympathetic with the State of Texas and, as a taxpayer, have a countervailing identification with the Estate. But he would be unlikely to feel empathy for California's tax claim.

The jurors' personal stake in the controversy makes a trial by jury in Texas federal court inconsistent with the disinterested trier of fact required by the Due Process Clause. *Tumey v. Ohio*, 273 U.S. 510 (1927) (village mayor who received $12 in costs if defendant convicted has disqualifying self-interest); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (invalidating conviction by mayor's court whereby mayor, in addition to judicial functions, possessed executive responsibility for village finances which were affected by fines levied in his court); *Connally v. Georgia*, 429 U.S. 245 (1977) ($5 fee for issuing search warrant disqualifies magistrate).[28]

(c) *Effects of Regional Pride.* Trial of this action in Texas also runs the risk that the parochial effects of local and regional pride could have an effect upon the jury. Howard Hughes was a distinguished American who pioneered in aviation, film production and business and—financial benefits aside—any

[28] Of course, where the only fact-finders available to resolve a dispute all have a direct or indirect interest in the outcome, the "rule of necessity" applies and the case will be decided by the available judges or jurors. *United States v. Will*,—U.S.—, 49 U.S.L.W. 4045 (December 15, 1980). But here a forum in which disinterested citizens reside can be provided through a Section 1404(a) transfer. *See* note 26, *supra*. The rule of necessity is therefore inapplicable.

The line of cases cited in text is underscored by the Court's recent decision in *Marshall v. Jerrico, Inc.*—U.S.—, 48 U.S.L.W. 4485 (April 28, 1980). There the Court confronted an attack on the enforcement of the Fair Labor Standards Act by the Employment Standards Administration (ESA) of the Department of Labor, based on the fact that the ESA received civil penalties assessed under the Act as reimbursement for the costs of determining violations and assessing penalties. Noting that the "requirement of neutrality has been jealously guarded" (*id.* at 4486), the Court nonetheless rejected the due process challenge, holding that "the strict standards of *Tumey* and *Ward*" were not applicable to the ESA, which acted as a prosecutor rather than a judge in Fair Labor Standards cases. *Id.* at 4487. (The actual determination of such cases was performed by the Office of Administrative Law Judges, which received no funds whatever under the statutory scheme.) But the clear intimation of the opinion is that if *Tumey* and *Ward* had been applicable, the fact that the decision maker's agency would financially benefit from a favorable decision would have violated the due process clause. It follows that the same prohibition would prevent a juror from adjudicating a case the result of which would be to cause a substantial benefit to accrue to the juror's home state unless, of course, no alternative forum were available.

state would be proud to claim him as its own. The determination of domicile in a death tax case inevitably involves conflicting interpretations as to the decedent's mental intent, that is, where the decedent felt his "home" was. If this case were tried in Texas, this subjective determination inherently would be open to the risk that jurors would—despite instructions to the contrary—use their personal feelings about their home state of Texas as a guide to divining the feelings of the decedent. Moreover, the pride and affection which each Texas juror justifiably has for the State of Texas would make the jury uncommonly receptive to evidence, such as Mr. Hughes' past statements about Texas,[29] which jurors drawn from other states could view dispassionately.

---

[29] For example, counsel for Texas made the following statement in his closing argument to the jury in the previous state court trial:

> "I think this is as good a time as any to explain that our chief witness in this case has been Howard Hughes, and we have tried to bring you what Mr. Hughes said, and I think that you all realize that there are times in a man's life or person's life . . . where you say things with more seriousness than you do at other times, and I believe we can point out to you that when there was a really serious event, that Mr. Hughes became a Texan and was a Texan and said he was a Texan for the world to hear.
>
> "And the first such event that I will speak to, now, is this 1938 reception. He is back *here*, at his boyhood home. He is at the Rice Hotel, and I read to you from the paper what he said, . . . the paper said, 'Bashful as a schoolboy and just as captivating, Mr. Hughes dug down in his pocket and brought out a wad of notes from which he spoke. 'If you don't believe I wrote this, myself, just try to read the handwriting,' he said. 'Coming from Texas, particularly if it's a person flying around the world,' Mr. Hughes said, 'there is nothing you can see anywhere that you can't see in Texas. After you have flown across Texas, two or three times the distance around the world doesn't seem so great. We didn't see any mountains on our trip that were any steeper than the mountains in West Texas. We didn't see any plains that were any broader than the plains of Central Texas, and we didn't see any swamps that were any wetter than the swamps of Southeast Texas.'
>
> "Now that is what Mr. Hughes said about his state, and he said it *here* and he said it to people who were *here* welcoming him home; and I want you to pay close attention as we bring you, today, a recap of all the statements that Mr. Hughes ever made about Texas, because you are going to be asked to believe by the Administrators that he declared himself an ex-Texan, that he didn't like Texas, that he left it in 1925 and

(footnote continued on following page)

(d) *Publicity Concerning Prior State Verdict.* The danger that the decision in this action might be influenced by considerations of local or regional pride if tried in Texas is exacerbated by the substantial prior publicity accorded to a prior state court domicile trial between Texas and the Estate. As with everything Howard Hughes touched, the Hughes probate proceedings have engendered an enormous amount of publicity, much of it generated by the prior domicile trial in the Texas state courts. The record reveals that the Austin press has devoted extensive coverage to the tangle of legal proceedings which have developed since Howard Hughes' death, with, of course, particular emphasis on the domicile trial. *See* R.I., 105 and attached Exhibits. Should this action be tried to a jury in Austin, it will doubtless be exceedingly difficult, if not impossible, to find jurors who have not heard about—and been influenced by—the prior state court proceedings relating to Howard Hughes. While in the ordinary retrial of a case, the members of the jury pool will be unaware that a prior verdict was rendered, litigating this action in Texas minimizes the chance that jurors will be found who are unaware of and uninfluenced by the prior adjudication.[30]

(footnote continued from previous page)

never thought about it again. *And I want you to listen closely and think about all the statements that Mr. Hughes made about Texas, and I want you to think as to whether or not you could refer to your state in the way that he referred to Texas in 1938, here in Houston, if it didn't mean something just a little special to him.* And you are going to be asked to believe that this Texas domicile is a fixation that exists only *here in Texas.*" (Reporter's Transcript, February 15, 1978, at 22-24 (emphasis added)).

We do not suggest that any aspect of this argument was improper. But it is self-evident that references to the jurors' *own* feelings about their home-state of Texas are inherently likely to have a special impact upon a Texas jury.

[30] Of course, coverage of the Texas state court proceedings was not confined to the Texas press. But the record reveals that it was far more extensive. For example, the Austin paper had five times the number of such stories than the Denver *Rocky Mountain News.* *See* R. II, 244 and Exhibits B-1 and D-1.

But more fundamentally, the impact that any given quantum of coverage has on the average reader, or potential juror, surely depends to a large extent on the individual's own interest in the subject and, hence, on his or her residence. It cannot be doubted that press coverage of the prior verdict by a *Texas* jury finding a *Texas* domicile for Mr. Hughes has a greater impact in Austin than in Denver.

(e) *Appearance of Impartial Justice.* Finally, transferring this action to a forum without a domicile claim of its own would serve not only the actuality of justice, but also the appearance of it. A federal interpleader trial will surely generate as much or more publicity as the prior Hughes probate litigation. Should this action be tried in Austin and a finding of Texas domicile result, the suspicion will inevitably be created—despite most diligent efforts of the district court to assure a fair trial—that the verdict was the result of the economic, emotional and personal considerations discussed above, rather than a product of careful deliberation on the evidence presented. Certainly the citizens of California would not perceive that justice had been done. Because the "stringent" rule against decision makers who may not *appear* impartial "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties" (*In re Murchison*, 349 U.S. 133, 136 (1955)), this factor would furnish an independent and sufficient ground for compelling transfer even if the other factors mentioned above did not exist.

Thus, each potential juror—no matter how well intentioned and how carefully instructed by the District Court—would face a host of obstacles in attempting to arrive at an impartial verdict. He would know, because of the enormous size of the Estate, that finding Texas domicile could result in a personal tax saving or a substantial and costless increase in public services. As a Texan, he might be drawn by his own feelings about Texas in ways which would benefit one side of the case to the detriment of the other. He would be aware that a previous Texas jury had found Hughes to be a Texas domiciliary. While each of these factors might be influential in its own right, together they unconstitutionally jeopardize the possibility of a fair trial.

For these reasons, the motion to change venue should have been granted, and the Court of Appeals therefore erred in holding that the district court did not abuse its discretion in denying California's motion. If, despite the arguments presented earlier, controversies of this kind *are* to be heard in federal district courts, it is of vital importance that this Court give

guidance on the question of venue so that a fair trial will be afforded to both of the claimant states.

CONCLUSION

The petition for certiorari should be Granted.

DATED: March 12, 1980.

Respectfully submitted,

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax Attorney
Division of Inheritance & Gift Tax
107 South Broadway
Los Angeles, CA 90012

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, California 94108
(415) 434-1600

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
Capital National Bank Building
Post Office Box 1148; 12th Floor
Austin, Texas 78767
(512) 472-8422
Attorneys for Petitioners

**Counsel of Record*